91-489

No. 91-849

In The

Supreme Court of the United States

October Term, 1991

OMAHA INDIAN TRIBE, TREATY OF 1854 ORGANIZED PURSUANT TO THE ACT OF JUNE 18, 1934 (48 STAT. 984 25 U.S.C. 476) AS AMENDED,

Petitioner,

vs.

AGRICULTURAL & INDUSTRIAL INVESTMENT COMPANY; EDNA BOULDEN MILLER, ET AL; JOHN R. WILSON; CHARLES E. LAKIN, FLORENCE LAKIN; R.G.P., INC., AN IOWA CORPORATION; HAROLD JACKSON; OTIS PETERSON; DARRELL L. HAROLD, and LUEA SORENSON; STATE OF IOWA and IOWA DEPARTMENT OF NATURAL RESOURCES, ET AL.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR EDNA BOULDEN MILLER, ET AL. IN OPPOSITION

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QUESTIONS PRESENTED

The "Questions Presented" section comprising pages (i and ii) of the Petition can fairly be condensed into two questions:

(1) Whether Petitioner was denied a full and fair hearing on its December 5, 1989 motion?

(2) Whether Petitioner was entitled to but denied a full and fair hearing on its "forced fraudulent representation" charge which is repeatedly raised throughout the Petition?

Both of these questions were presented to the Court of Appeals as part of the one real issue before it, to wit: *Was the dismissal of Petitioner's suit within the proper discretion of the District Court?*

LIST OF PARTIES

The Petitioner's List of Parties at p. iii fails to include the 81 following parties for whom this brief in opposition is filed:

> Edna Boulden Miller, Ethel A. Parks, Myrtle G. Riggs, George Robert Boulden, Jr., Cleo Cox, Ethel McCoy, John K. Craford, M. George Craford, Rose Ann Kane, June Craford Seacat, David G. Craford, Easton Bearce, John H. Lund, Ruth J. Lund, Monona County Rural Electric Cooperative, Arthur Orr, George C. Ruth, Anena Ruth, Richard A. Ruth, Jean M. Ruth, W.W. Virtue, Jack D. Virtue, Terence C. Virtue, James T. Craford, Sidney Craford, Del Marks, Terry Marks, Margo Marks, Herbert Fletcher, Shirley Kirk Hofling, Glenda Wiggs, Cleo Heck, Rosalie Sanders, Robert Hickman, Robert A. McFarland, Imogene Anderson, Donna C. Ford, Joan S. Jacobson Jensen, Hazel I. Jacobson, Wm. S. Jacobson, Ray L. Grosvenor Trust, Roberta E. Taylor, Harold Queen, Leslie Hickman, Maude Seubert, John M. Ropes, Majayne Ropes Weber, Douglas Rush, Wilfred Rush, Robert Rush, Phyllis DeWolf, Elaine Johnson, Harriet Johnson, Everett Swan, Glen Swan, American Telephone and Telegraph Co. and Iowa Public Service Co.

These respondents are for the most part family farmers whose forbears and predecessors in title obtained title in the 19th century through U.S. patents, swampland grants, State of Iowa patents or similar title foundation. Their 39 farms comprising approximately 6500 acres lie outside (i.e. to the east and north of) the Barrett Survey of 1867

LIST OF PARTIES – Continued

which defined the boundaries of the Omaha Indian Reservation. Reservation land is held in trust by the United States for the benefit of the Tribe but numerous decisions of this Court and the Court of Appeals have established that land outside the Barrett Survey is not trust land.

Wilson v. Omaha Tribe, 442 U.S. 653 (1979) Appendix I

Omaha Tribe v. Jackson, 707 F.2d 304, 306, 309 (8th Cir.) 1982

Omaha Tribe v. Jackson, 854 F.2d 1089, 1092, footnote 4, 1096 footnote 4 (8th Cir.) 1988

These respondents' land lying as it does outside the Barrett Survey is therefore non-trust land. They were not parties to any of the consolidated cases and have been parties only to this case C75-4067.

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JURISDICTION

Petitioner's identification of Plat I at page 3 is inaccurate and misleading. Plat I does not show *only* "the area in litigation which is referred to as the 'unconsolidated' phases of Petitioner Tribe's action." It also shows 2900 acres inside the Barrett Survey in the Blackbird Bend

which have already been decided in the consolidated cases and are not now in litigation.

STATEMENT OF THE CASE

The List of Parties at page 7 is again incomplete as was shown at page ii supra discussing the List of Parties at page iii of the Petition.

MISSTATEMENTS OF FACT OR LAW IN PETITION

In compliance with this Court's Rule 15, these Respondents now address "perceived misstatements of fact or law set forth in the petition" which appear at the following pages of the Petition:

Footnote 2, Page 2

This footnote incorrectly states "the Supreme Court upheld Petitioner Tribe's assertion that Respondents had the burden of proof pursuant to 25 U.S.C. 194." These Respondents were not parties to the suit decided by this Court in 1979. *Wilson v. Omaha Tribe*, 442 U.S. 653 (1979) Appendix I. That opinion made clear at p. 670 it applied only to "The area within the (Barrett) survey (which) was part of land to which the Omahas had held aboriginal title ** and designated by the U.S. as a reservation." Appendix I p. 78a. The land of these Respondents is not "within the Barrett Survey." As stated in Omaha III, *U.S. v. Wilson*, 707 F.2d 304, 309 the "area claimed by the landowners is not trust land * in which the Tribe can claim that it is entitled to presumptive title by reason of Section

194. ** the Tribe must carry its burden of proof of rightful ownership as to this land. Because section 194 is not applicable, it is clear that the burden of proof does not rest on the landowners." Cited at *Omaha Indian Tribe v. Jackson*, 854 F.2d 1089 (8th Cir. 1988) at p. 1092.

Paragraph (e) Page 9

Here it is stated that the magistrate ordered Petitioner on August 18, 1989 to submit a proposed final pre-trial order to him by September 1, 1989 and scheduled a final pre-trial conference for September 8, 1989. These actions by the magistrate were entirely proper and in compliance with R.C.P. 16 (Petition at p. 5 omits paragraphs a – d of Rule 16 governing pre-trial conferences and shows only (e) and (f).) When Petitioner's attorney repeatedly failed and refused to submit a proposed final pre-trial order in compliance with the magistrate's order and the Rules of Civil Procedure he made himself and his client subject to disciplinary action including sanctions. He compounded this contempt of court at the final pre-trial conference itself on September 8, 1989 by refusing to agree to any facts as the petitioner admits in the Petition at Paragraph f p. 9: "Petitioner could not agree to any facts pertaining to its claims to 9400 acres," and at Paragraph g, p. 10 "Counsel (refused) to agree to any facts pertaining to river morphology ". It is also admitted at Paragraph h p. 10 of the Petition that "Counsel refused to agree to any facts" at the previous pre-trial conference on August 22-23. It is evident from the lengthy quotation of counsel's remarks at that conference set forth in the indented quotations at the bottom of p. 10 that counsel was unwilling to make any attempt to agree on *any* facts. Although opposing counsel had submitted a written

statement of facts to him for his consideration at the conference as required by the rules, counsel for Petitioner presented no written statement to defense counsel.

Paragraph (3), Page 11

Petitioner asserts the following accurate statement in the opinion below is a "false and fabricated charge".

> [Mr. Veeder] "stands obsessed with the charge of fraud against the government and the complicity in such fraud by Judges McManus and Urbom. He maintains this charge notwithstanding this Court's prior dismissal of such a claim."

The 8th Circuit did indeed in 1988 dismiss such a claim arising out of the same transactions as stated in *Omaha Indian Tribe v. Jackson*, 854 F.2d 1089, (8th Cir. 1988) at footnote 4 p. 1092 as follows:

> "4. In this appeal, the Tribe also maintains (1) that the Department of Justice attorneys engaged in fraud and collusion in their representation of the United States as trustee for the Tribe, and (2) that 25 U.S.C. Section 194 applies to the fee patented private defendant landowners. We find these claims to be without merit.
>
> The Tribe first raised the charges that the Department of Justice attorneys engaged in fraud in 1976. However, the Tribe failed to again raise the issue until 1985 even though the case had been reviewed once by the Supreme Court and three times by this court. At that time, the district court held that the Tribe's motion to disqualify the government attorneys was

> 'clearly untimely and merits no serious attention or consideration.' The Tribe subsequently petitioned this court for a writ of mandamus alleging the same charges. This court not only dismissed the Tribe's petition as 'frivolous and totally without merit' but also awarded the United States costs and attorney's fees as sanctions against counsel for the Tribe for filing 'a totally frivolous pleading.' In Re: *Omaha Indian Tribe*, No. 86-1717 (8th Cir. July 18, 1986) (order denying petition for writ of mandamus.)"

Paragraph (4), p. 11

Here Petitioner's attorney does violence to semantics when he denies that he "ever at any time charged the 'government' of the U.S. with fraud." He has, after all, charged the U.S. Attorney who signed the complaint, the Deputy Assistant Attorney General, U.S. Department of Justice and all Department of Justice Attorneys who have represented the U.S. in this case with fraud. Surely in this context the government itself was and is being charged with the alleged fraudulent acts of its attorneys.

Last three lines page 11 and first three lines page 12

Here it is a further misstatement of facts to state that Evan L. Hultman "divided up virtually the entire 6390 acres of the Blackbird Bend Meander Lobe among those Respondents," namely State of Iowa, RGP Inc. and Lakin. The true fact is that the farmer Respondents for whom this brief in opposition is filed and their predecessors owned 903 acres in the Blackbird Bend, plus 5600 acres in the Monona and Omaha Mission Bends which are claimed by the Tribe.

Last 3 lines page 14 and first 7 lines page 15

There is no support in the record to support the erroneous statements here that antecedent to his May 7, 1990 Order (Appendix B) "Judge Urbom had never considered Petitioner Tribe's December 5, 1989 motion" (Appendix X) and that the Judge's alleged failure to consider said response to the defendant's motion to dismiss "is admitted by Judge Urbom." Judge Urbom in fact stated in his Memorandum and Order dated May 4 and filed May 7, 1990 (Appendix B p 3a) that he had given "lengthy consideration (to) the ** responses by the plaintiff" before entering the order and this clearly included Petitioner Tribe's response to the motions to dismiss. Moreover, in his consideration of plaintiff's December 5, 1989 motion in his order of May 29, 1990 Judge Urbom specifically found that "by way of its motions and the May 15, 1990 hearing," plaintiff has already had an adequate opportunity to be heard on its December 5, 1989 motions and to answer the charges made against it by the defendants. Appendix E at p 37a. By no stretch of the imagination can this be deemed an admission by Judge Urbom that he failed to consider the December 5 motion or hear plaintiff on it.

Last full paragraph page 15 and first 7 lines page 16

Here the Petition unfairly and inaccurately suggests that Judge Urbom erroneously and prejudicially included the following statement in his order of May 7, 1990 with reference to Petitioner's proposed pre-trial order:

> "First, the plaintiff has failed to make a good faith effort to arrive at any undisputed facts. The extremity of the failure is evidenced by the

> plaintiff's failure to agree even that the Omaha Indian Tribe is governed by a body known as the Tribal Council, or that the State of Iowa was admitted to the Union by an act of Congress on December 28, 1846." Appendix B p 3a.

Petitioner does not deny that when asked to agree to at least these two simple and obvious facts it refused to do so. It was therefore proper for Judge Urbom to include the quoted statement in his order. Counsel for the Petitioner in fact later admitted at the May 15 hearing on the issue of sanctions that these facts were uncontroverted. Appendix F footnote 6 p 54a.

Petitioner's only purported basis for alleged error in this respect is to pray (for the first time in this Petition) that it be excused for what it described (top of p 16) as "the inadvertent mistake (which) was made by the office staff in the final assembly of the pre-trial order." Although reference is then "made to the December 5, 1989 motion for a full explanation of that inadvertent mistake," citing Appendix X p 233a et seq at footnote 29, a careful reading of pp 233a et seq discloses not the slightest mention of any mistake due to shortness of time, inadvertent or otherwise. So far as our research can determine, the "inadvertent mistake of staff" excuse surfaced for the first time at pp 15 and 16 of the Petition.

Judge Urbom and the Court of Appeals should not be found in error for not being persuaded by an argument which was not raised before them and raised for the first time in this Court.

First full paragraph, page 17

We challenge this unfounded allegation that "Judge Urbom's ** charge that Petitioner Tribe had failed to refer to six alleged avulsions" was erroneous. The attack on the Court of Appeals stated opinion that "the Tribe failed to disclose in its proposed pre-trial order or its answers to interrogatories at least six avulsions in Omaha Mission Bend and Monona Bend is also a misstatement. In support of its claim that it did not withhold information as to six avulsions until after the final pre-trial conference Petitioner relies at pp 17 and 18 solely on what it divulged in its motion of December 5, 1989 already discussed above and its motion of March 13, 1990. However, there is no showing anywhere in the December 5, 1989 motion that the Petitioner had ever disclosed that it would attempt to prove and rely on the alleged existence of six new avulsions until this information was extracted from its expert witnesses in discovery depositions taken October 10-27, 1989, three days before the original scheduled trial date.

First 15 lines, page 18

These lines attack Judge Urbom's statement that "the plaintiff will not be allowed to benefit from its own concealment" on the spurious ground that Petitioner had allegedly acknowledged six additional avulsions in its December 5, 1989 motion, which was not filed until a month after the scheduled trial date. This attack misses the point that the concealment to which Judge Urbom referred was that which occurred when Petitioner answered interrogatories on May 15, 1989, and which was maintained during the ensuing months while the defendants were preparing for trial scheduled to begin on

October 30, 1989. Those preparations were based on an assumption that Petitioner's evidence would show only one claimed avulsion, and the concealment of additional alleged avulsions was not uncovered until the October discovery depositions. It is of no avail to Petitioner to file a motion on December 9 acknowledging avulsions which have been wrung from its experts in October depositions in the final crucial days of preparation for trial.

Lines 6-17, Page 21

Here the Petition erroneously states that "Judge Urbom demanded that Petitioner Tribe retry all of the issues" with reference to the Blackbird Bend Meander Lobe, citing Appendix B, p 4a. No such demand by Judge Urbom appears in Appendix B, his order of May 7, 1990. We point out that Judge Urbom was not assigned to the case until February 12, 1990. Appendix B p 16a. The first matter before him was the defendants' motions to dismiss with prejudice. When he sustained the motions on May 7, 1990 the case ended. He had not and did not demand that any issues be retried.

Third full paragraph, Page 23

This repeats the factual misstatement: "Petitioner Tribe was denied the right to have a full and fair hearing in regard to (its) motion of December 5, 1989." As stated at p 6 supra, Judge Urbom gave careful consideration to the motion before entering his order of May 29, 1989 Exhibit E pp 25a, 28a - 37a. He gave Petitioner a full opportunity to be heard on all matters including the December 5, 1989 motion and the "forced fraudulent representation" theory at the hearing on May 15, 1989 which lasted from 10:00 a.m. to 3:05 p.m. with 1 hour 25

minutes out for lunch. The transcript of Petitioner's argument alone fills 60 pages.

Last Paragraph page 26

Here the Petition erroneously states the district and appellate courts have denied "Petitioner Tribe's right to be represented by counsel of its own choice in *the action initiated by the Tribe in its own behalf.*" This case in which certiorari is asked is the case C75-4067 which was initiated by the Tribe in its own behalf on October 6, 1975. The complaint was drawn by Attorney William H. Veeder who has been attorney of record for the Tribe continuously since 1976 and represented the Tribe in the trial of the consolidated cases in November 1976. All published opinions in this and the companion consolidated cases show the appearance of William H. Veeder as counsel for the Tribe. He remains so today and the Petitioner's statement that the Tribe has been denied the right to be represented by counsel of its own choice in this action is patently untrue.

DISTRICT COURT DID NOT ABUSE DISCRETION IN DISMISSING PETITIONER'S CASE

Judge Urbom's Order of May 29, 1990 (Appendix E) dismissed the case with prejudice because of Petitioner's failure to prosecute, failure to permit discovery and failure to file an appropriate pre-trial order. A district court has inherent authority to dismiss a case for these reasons and this authority is supplemented by Fed.R.Civ.P., 16(f), 37(b) and 41(b). *Link v. Wabash Railroad Co.*, 370 U.S. 626 82 S.Ct. 1386 (1962), *Garrison v. International Paper Co.*, 714 F.2d 757 (8th Cir. 1983). Such a dismissal is reviewable

only for abuse of discretion. Thus the only issue before the Court of Appeals was: "Was the sanction of dismissal within the proper discretion of the district court?"

The record shows that in deciding whether to impose any sanction, Judge Urbom first carefully analyzed both the proposed pre-trial order filed by Petitioner and the following history of the Petitioner's conduct: Motions to compel the Petitioner Tribe to answer interrogatories were granted on January 26, 1989. The Court ordered a disclosure of expert testimony. Rather than comply with that order, the Tribe filed one of its motions to reconsider and stay. This motion was denied in an Order of March 24, 1989 and the Tribe threatened with the sanction of dismissal. This order also recounted the Tribe's prior conduct which consisted (in part) of being held in contempt, failing and refusing to pay sanctions to opposing parties, being incarcerated for contempt, refusing and failing to pay contempt fines to the court, and failure to pay sanctions imposed for filing frivolous motions. In addition, the court noted that the Tribe's failing to permit discovery had already led to a dismissal of its trespass damage claim in the consolidated case. Finally, the court observed that the Tribe had already by this early date established "a clear record of contumacious conduct," and that "lesser sanctions [had] been systematically and flagrantly disregarded, and are ineffective to achieve compliance."

Notwithstanding the threat of dismissal of its entire case, the Petitioner failed to provide expert witness information by the April 10 deadline. On May 2 the Court gave the Tribe another grace period until May 15, 1989 to designate expert testimony. The Tribe's response merely

was that its experts would give the same testimony as in the consolidated case.

Upon the Respondents' motions to dismiss as a sanction for failure to designate expert testimony the Magistrate found that the Tribe had failed to designate expert witnesses but instead of dismissing the case, as had been threatened in the March 24, 1989 order, he ordered the lesser sanction of limiting the Tribe's expert testimony to that which had been given at the first trial. This same order noted that the Tribe had steadfastly refused to respond to interrogatories directed to its damages claims. And, again, instead of the dismissal that had been threatened, the magistrate precluded evidence on the issue of damages.

Thereafter, a final pre-trial conference was scheduled for August 18 and rescheduled for September 8, 1989. Pursuant to local rule 16(b) and (c) the parties were required to meet sufficiently in advance of the conference to prepare a proposed pre-trial order. The parties did meet on August 22-23. The district court, having the benefit of a transcript of those proceedings later found "that the Tribe was unprepared, combative, and failed to endeavor in good faith to satisfy the purpose of that conference". . .The Tribe refused to stipulate to the content of abstracts of title; refused to agree to the foundation of any exhibits; objected to all exhibits on all grounds; rejected proposed stipulated facts out of hand; and refused to waive foundation objections to official government documents such as Corps of Engineers reconnaissance maps, U.S. Government patents, swampland grants, tax receipts, abstracts of title, government

tax lists, court records, reports of the state land office and U.S. Geological Survey quadrangles.

The Tribe was required to file a proposed final pre-trial order in the form set forth in the local rule signed by counsel for all parties. The Tribe failed to prepare an integrated proposal; instead it merely stapled together the parties' separate proposals and made no effort to list exhibits according to the category of objections waived. The Tribe was ordered to try again by September 25. Its response was to file another motion to reconsider.

On September 29, 1989, Judge McManus found that the initial proposed pre-trial order was inadequate, that pre-trial procedures had failed because of the Tribe's conduct and that the order to file an acceptable pre-trial order by September 25 had been ignored. Again, the Tribe was given a reprieve, but dismissal with prejudice was threatened unless a "revised proposed final pre-trial order in the form required by this court" was delivered to the magistrate by October 16.

Petitioner delivered its proposed final pre-trial order on October 16, 1989. The magistrate found that the proposal "does not comply with previous orders directing its preparation . . . and does not reflect the status of this litigation." The defendants again moved for dismissal on the ground that the Tribe had failed to abide by the September 29 order mandating the filing of an adequate proposed pre-trial order by October 16, 1990.

Having reviewed this "dismal history," Judge Urbom *still* did not order dismissal; instead on May 7 he ordered a hearing to explore the possibility of sanctions short of dismissal. Appendix B p 17a. At that hearing on May 15,

1990, the Tribe made it clear that it would continue to defy court orders. Its Counsel proclaimed he was "perfectly willing to go to jail" rather than give up the frivolous theory of fraud or pay previous monetary sanctions. He gave the court no assurance that Petitioner would henceforth comply with court rules and made it clear he would carry on in defiance of the court as he had in the past. Judge Urbom had no choice but to dismiss.

In his doing so there can be no doubt that Judge Urbom scrupulously adhered to the admonition in *Garrison v. International Paper, Inc.*, 714 F.2d 757, 760 (8th Cir. 1983) that all the facts and circumstances of the case be considered. "The most important factor in the balance is the egregiousness of the plaintiff's conduct." *Garrison, supra*, 714 F.2d at 760. Judge Urbom was faced with a party that had already been jailed for contempt and with an attorney for that same party who was willing to go to jail rather than comply with a court order. This same party having previously been sanctioned for asserting a frivolous claim both in this court and in the court below, and having been ordered *in limine* to not refer further to it, persisted in pursuing it in the proposed pre-trial order and at the May 15, 1990 hearing.

In reviewing a dismissal for abuse of discretion, the appellate court may not inquire whether it would have arrived at the same decision as the court below, nor should it substitute its judgment for that of the district court. *National Hockey League v. Metro Hockey Club, Inc.*, 427 U.S. 639, 642, 96 S.Ct. 2778, 2780 (1976); *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208, 1213 (8th Cir. 1981). In other words a review for abuse of discretion should

not inquire whether some other remedy might have worked or might have been fashioned and tried.

Welsh v. Automatic Poultry Feeder Company, 439 F.2d 95, 97 (8th Cir. 1971), *quoting*, *Bowles v. Goebel*, 151 F.2d 671, 674 (8th Cir. 1945).

Judge Urbom painstakingly reviewed the Tribe's submission of a pre-trial order in light of the history of the case and determined that sanctions were appropriate, but he very cautiously sought further input before deciding what sanction would best serve justice. He heard the Tribe in oral argument. He read and analyzed Petitioner's voluminous filings of October 24, 1989, December 5, 1989, and March 13, 1990. Having received no recommendation or suggestion from the Tribe as to an appropriate sanction, Judge Urbom carefully reviewed the possible options short of dismissal that he had requested the parties to discuss. His orders reveal an exercise of discretion that is unassailable.

Where lesser sanctions have been imposed but not produced adherence to the rules and orders of the court, dismissal with prejudice is appropriate. *Brown v. Frey*, 806 F.2d 801 (8th Cir. 1986). Failure to file a conforming proposed pre-trial order, if repeated (as in this case) is in itself a sufficient basis for dismissal with prejudice. *Burgs v. Sissel*, 745 F.2d 526 (8th Cir. 1984). When the sanctioned party has been given warnings that non-compliance would result in dismissal, no abuse of discretion occurs if the warning is unheeded. *Sherman v. U.S.*, 801 F.2d 1133 (9th Cir. 1986); *Callip v. Harris County Child Welfare Dept.*, 757 F.2d 1513 (5th Cir. 1985).

CONCLUSION

The Petition for Certiorari fails to show denial of a full and fair hearing within the meaning of the due process clause. It also fails to show that dismissal of the complaint was an abuse of the district court's discretion. The Petition should be denied.

Respectfully submitted,

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